

TAB 1:

Victory Article from the Journal of the Colorado Association of Home Builders following amendment of Colorado's Construction Defect Action Reform Act ("CDARA") in 2003.

TAB 2:

Prior legislative hearing testimony from Dennis Polk, Esq. who testified in favor of SB 52, that 93-94% of construction defect claims are resolved during CDARA's existing Notice of Claim Process and that these claims are resolved without resort to litigation.

TAB 3:

Prior legislative hearing testimony from Senator Scheffel correctly acknowledging that current law provides construction professionals with an opportunity to repair and replace.

TAB 4:

Photographs of unreasonable and dangerous repairs actually performed by builders before any litigation occurs. SB 52 would prohibit homeowners from rejecting unreasonable or dangerous repair offers.

TAB 5:

Photographs of damages caused by environmental conditions. SB 52 would immunize construction professionals from liability for damages caused by environmental conditions involving transit-oriented developments.

TAB 6:

Map illustrating locations of commuter bus stops in Denver and portions of the Denver metro area. SB 52 applies to any mixed use or multifamily development within ½ mile of a bus stop and would apply to nearly all of Colorado's urban areas, and many suburban areas.

COLORADO BUILDER FORUM

MAY-JUNE 2003

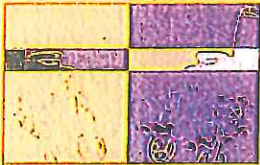
VOL. 7 NO. 3



The Long Way Home

*Pagosa Springs builder Tim Horning has taken the long and winding road to find the place he calls home.
see page 16*

IN THE FORUM



PAGE 13

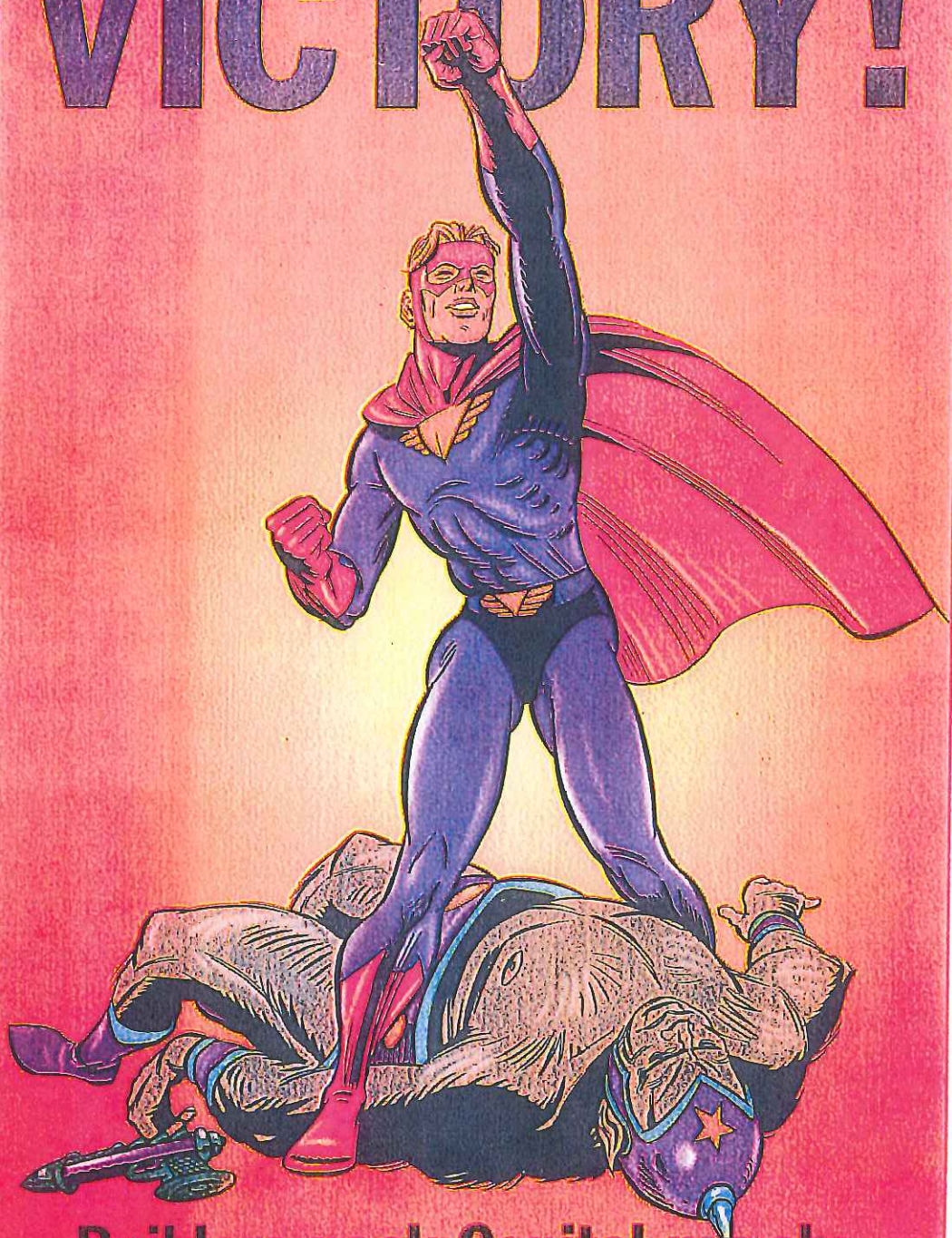
Creative compromise brings realistic rules for new law outlining accessibility requirements.



PAGE 23

Drought taps into builders' wallets throughout metro area.

VICTORY!



**Builders pack Capitol punch;
defects reform becomes law**

see page 6

Builders Pack a PUNCH

In a fight to the finish, Colorado builders came out on top in a battle over construction defects legislation

By Joe Reid
Colorado Builder Forum

Facing what was seen as a "must-win situation," Colorado builders came away with a major victory in their efforts to provide some relief to skyrocketing insurance costs.

Although the fight was close, the state legislature passed HB-1161, Constructive Litigation Reform during the past session. The bill was signed into law by Gov. Bill Owens on April 25, bringing immediate relief to builders who have struggled with an insurance market gone haywire from the threat of big-ticket lawsuits filed over construction defects.

"This is going to have a huge impact on the problem," said Chris Elliott of 7353 Investments and chair of the CAHB Governmental Affairs Committee. "This was an effort to put things back into balance."

The bill contains three major elements designed to provide consumer protection while eliminating the threat of what building officials have termed "frivolous lawsuits" that seek more to fatten the wallets

of attorneys than address actual construction defects. The trio of cures includes a right to remedy and notice provision, a limit on lawsuits to allow only actual — not probable — damages, and a \$250,000 cap (including attorneys fees) for punitive damages filed under the Colorado Consumer Protection Act (CCPA).

The right to remedy requirements restore some fairness to a process that often begins with only one goal in sight: a major lawsuit and a major settlement. The new law now requires consumers to notify builders of a problem and provides a timeline for resolving any problems. It makes lawsuits the final step, not the first step.

"Right to remedy is huge," said Jim Harmon, president of Amber Homes. "Many builders don't even hear that there is a problem until they learn about it when a lawsuit is filed."

The second element limits damages to those actually incurred by the homeowner and eliminates the common practice of "fishing" for probable damages in negligence cases. The provision aims to "make the consumer whole" while reduc-

ing the threat of being sued for defects that do not exist.

"It used to be they could say we found mold in one closet, so there is mold in every closet and our claim is based on that," said Harmon.

The final element limits the infamous "treble damages" claims under the CCPA to \$250,000, including attorneys fees. Under previous law, the threat of treble damages was "a big loaded gun" pointed squarely at the temples of insurance underwriters, according to Clayton Sharkey of IMA of Colorado, an insurance brokerage that has been closely tracking the construction defects issue.

While some may see damage limits as a threat to consumer protection (an argument made vehemently by the trial lawyers who specialize in defects claims), builders like Harmon see them as a requirement for fairness.

"Why should people get rich if someone made an honest mistake?" Harmon asked. "With this law, builders still end up being responsible to fix a problem, and the good builders will always do that."

HB-1161 Timeline

Despite all the planning, the bid to pass constructive litigation reform was never a sure thing. Anything introduced into the legislature runs the risk of a political hijacking, and HB-1161 was no exception.

Although the bill became law, and was effective immediately upon the governor's signature on April 25, 2003, it took on several different forms during its journey.

Here's a rundown of the sometimes rocky road to law traveled by HB-1161.

1/14: Introduced in House — assigned to Business Affairs & Labor Committee.

Rep. Gregg Rippey, R-Glenwood Springs, carried the bill in the House. He sponsored a similar measure in the previous session that went nowhere.

During testimony for and against the bill, supporters got their first peek at the opposition's arguments and were surprised to find them weak and disjointed. "The opposition was weaker than we expected," said Rob Nanfelt, CAHB government affairs director. "There was nothing organized against the bill specifically, just a parade of horror stories."

1/16: House Committee on Business Affairs & Labor — passed, amended, to House committee of the whole.

There wasn't much doubt about the bill passing from the committee to the House. "We sensed the committee meetings would be a long, painful and arduous process, but we knew it would pass — we knew we had the votes," said Nanfelt. The bill passed from the committee with only technical corrections.

1/24: House second reading — passed with amendments.

When HB-1161 arrived in the House, it came with a number of drafting errors that threatened to hold up its passage. Supporters knew the vote in the House would be close, and they did not want to let the opposition gain momentum from a delay, so they essentially asked lawmakers to vote for a version of the bill that was different from the one before them.

1/27: House third reading — passed.

The final, corrected version finally arrived, and it passed on a close vote, 34-31. It was on to the Senate.

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Three Key Areas: Highlights of HB-1161

Right to Remedy

At least 75 days prior to the filing of an action, a claimant must give the builder a notice that describes the defects, the location of the defects and a general description of the damages that are claimed. A builder must then respond to the notice if the builder wants to take

advantage of the benefits provided by the bill (primarily limits on damages). A homeowner must allow a reasonable inspection of the premises, enabling the builder to respond. The bill creates consequences for failing to respond to a notice of construction defect and likewise creates consequences for a

claimant who does not accept an offer of settlement under the bill (see discussion of Colorado Consumer Protection Act).

Limitation on Damages

One of the other significant aspects of the bill is to limit a plaintiff's recovery in construction defect cases to "actual damages," with regard to properly based claims. Actual damages are the lesser of:

(1) the fair market value of the property as if no construction defect existed, or (2) the cost of replacement or (3) the cost to repair plus relocation costs, interest and any actual economic damages caused by the loss of use of the premises. "Probable damages" are no longer available in negligence cases.

Continued on page 11

continued from page 6

And in those cases involving dishonest builders, consumers can still collect punitive damages without any limitations, Harmon said.

"If they can prove fraud, then they can still get their triple damages," he said.

The new law represents a major turning point in builders' efforts to restore balance to an industry that has seen insurers vanish in the wake of major claims based upon the old defects law.

The immediate impact of the new law, which was effective April 25 upon Owens' signature, is to limit damages under the new standard. But there is a longer term goal as well: creating a building risk environment that will spur insurers to return to the state.

"This law is a major step in the right direction," he said. "It goes to the fundamentals of underwriting, and predictability of losses is key."

Lacking that predictability, and faced with the prospect of multi-million-dollar lawsuits, most insurers simply stopped writing policies for builders.

"Over the past five or six years, there has been a simple commandment: thou shalt not write residential policies in Colorado," Shuckey said.

Harmon saw the number of insurance companies willing to cover Amber Homes drop from 27 to two in the past five years, and his rates reflected the lack of competition. His latest policy saw a \$50,000 jump in one year, and it excludes the major items of mold and soil subsidence.

"I can't tell you yet what is going to be the thing to bring insurers back into the market, but the concept of limiting the damages is huge," said Harmon. "Now insurance companies can underwrite their risks."

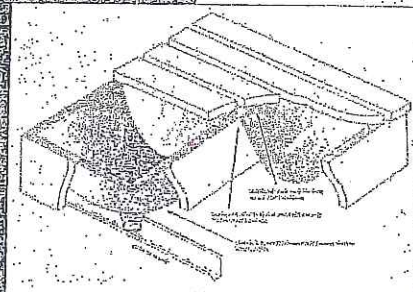
Bringing insurers back into the market will go a long way toward resolving the twin issues of sky-high rates and limited coverage, said Harmon.

"We need the competition; right now things are more risk based than market based," he said. "It's common sense that when there are only two

continued on page 12

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COVERSTORY/from page 7

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Insurers are already showing increased interest in Colorado now that HB-1161 has passed.

"We have already seen some interest, and we are looking to get in front of the underwriters and reinsurers to move some people back into the market," said Sharkey.

But Sharkey warned it won't happen overnight.

"It will take some time to allow insurers to review the bill and see how

it addresses the typical construction defect case," he said.

How will builders know the new law is working for them? Sharkey said it should start to become clear in the coming months. Currently, only two or three companies are doing business in Colorado, but Sharkey said he hopes that will double in the next few months.

"Remember, for the past five or six years we've been dealing with the mentality that you can't write in Colorado," he said. "But I'm hoping that three months from now, we would consider it

a huge win to be able to double the number of players in the market."

Winning strategy

The effects of the new law will not be felt for months, but the strategy that led to the constructive litigation reform has already paid off.

"We were willing to take this to the next level to get it passed," Elliott said. "If nothing more than 1161 passed, then this session would still be marked as a success."

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HB-1161 Timeline

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1/29: Introduced in Senate — assigned to Business Affairs & Labor Committee.

Sen. Andy McElhany, R-Colorado Springs, was the Senate sponsor and chair of the committee that would draw the bill. "We knew we would be good in committee in the Senate; it was McElhany's committee and we had the votes," said Nanfelt.

2/10: Senate Committee on Business Affairs & Labor — passed, amended, to Senate committee of the whole.

In the Senate, the bill began to see more organized opposition, but supporters were confident they would have a 4-3 vote to move it out of committee. As it turned out, the vote became 5-2 when then-Sen. Penfield Tate voted for the bill.

2/19: Senate second reading — passed with amendments.

It quickly became apparent that the bill did not have enough votes to pass the whole Senate. Lobbying began in earnest, with statewide efforts to gain support in key districts (with key senators). Media scrutiny was intense, and Attorney General Kent Salazar had floated his own proposal, which was now gaining traction with senators.

In order to move the bill, supporters decided to allow the addition of the Salazar proposal to HB-1161 and take their chances in the inevitable conference committee that would result.

2/20: Senate third reading — passed.

A modified HB-1161 passed and was returned to the House for a vote on concurrence.

3/7: House considered Senate amendments — result was to not concur — request conference committee.

On to the conference committee where bill supporters would fix the problems, restore some original elements and then return for final votes in the Senate and House.

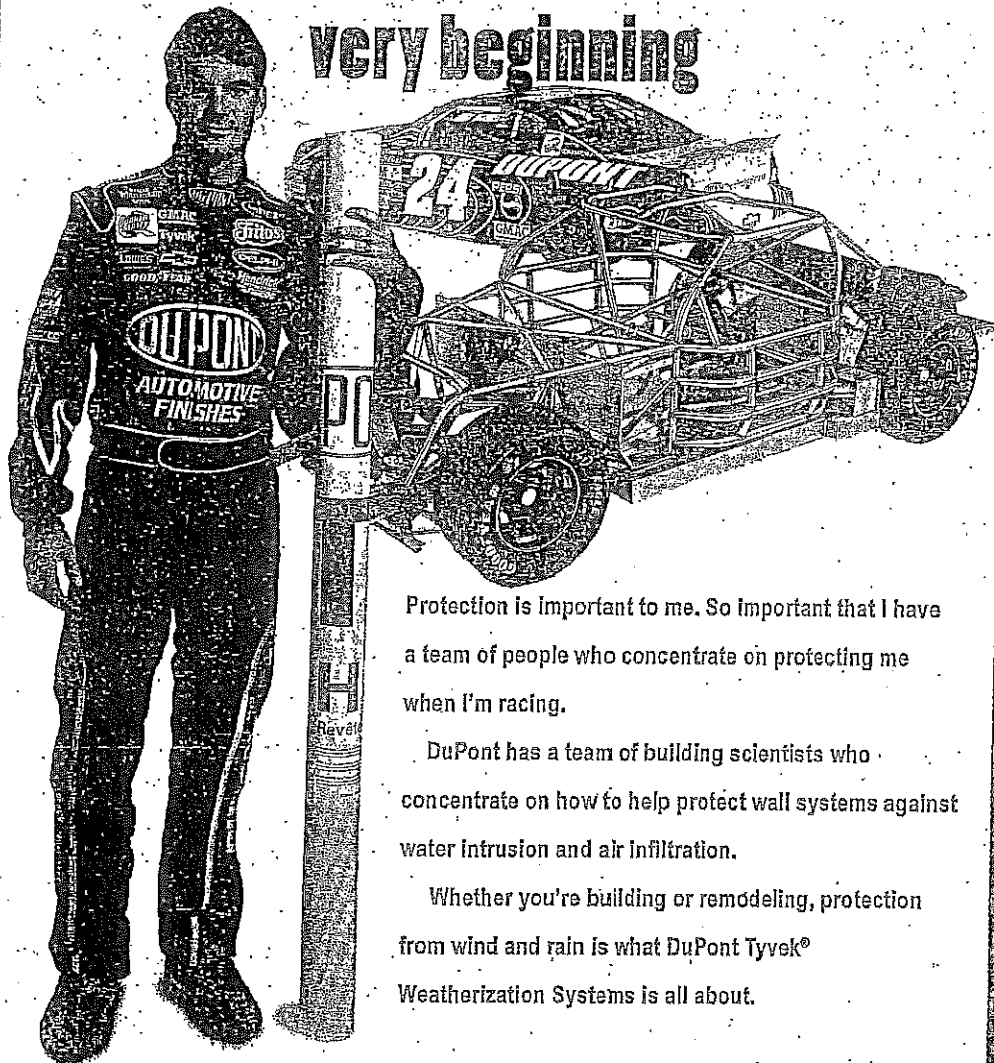
4/8: First conference committee — result was to adopt revised with amendments.

A funny thing happened on the way out of the conference committee: the attorneys fees were removed from the \$250,000 cap on damages.

This required a second conference committee meeting to fix the problem and issue a final report.

continued on page 14

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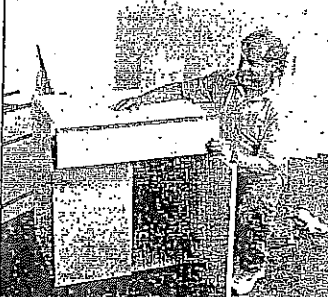
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The groundwork for success was laid during the 2002 elections, which returned the Republicans to a leadership role in the Colorado Senate.

"The change in the Senate was essential" to getting the reforms passed, Elliott said.

When the Democrats were in charge of the Senate leadership, there was no chance of passing an overhaul of the defects statute.

"Even if we could go and negotiate something reasonable with enough senators, they (the leadership) would never let us move it," Elliott said. "A leadership change was essential."

But it was only the beginning of the highly coordinated effort it would take to pass HB-1161.

"We really tried to anticipate every move of the opposition, and focus on the legislative swing votes," Elliott said.

A key element of this strategy was a full-court press in key districts statewide. Using local builders and newspapers, the coalition fighting for reform was able to build grass roots support for the issue that paid off on the statehouse floor.

More to come

And the politics has not stopped. Builders should be aware that the same interests leading the opposition to HB-1161 are now seeking to overturn the new law, according to Rob Nanfelt, CAHB government affairs director.

Backed by the trial lawyers, lobbyist Freda Poundstone is pushing a constitutional amendment that would essentially gut the new law by removing any limitations on damages. "We would essentially go back to a blank check system for damages," he said.

The initiative is still in its infant stages, and will require final approval of the ballot title and then the signature

HB-1161 Timeline

continued from page 12

4/16: Senate consideration of first conference committee report — result was to adopt committee report — re-pass.

The final vote for the bill was 18-17. Sen. Abel Tapia, D-Pueblo, was one of two Democrats (the other being Sen. Bob Hagadorn, D-Aurora) who broke ranks and voted for the measure.

4/17: House consideration of first conference committee report — result was to adopt committee report — re-pass.

Initial fears of a close vote don't materialize, and it passes 37-26.

4/18: Signed by the president of the Senate.

The first of the final three steps.

4/18: Signed by the speaker of the House.

The second.

4/25: Signed by the governor.

The new law was effective immediately upon the governor's signature, and builders quickly saw the effects that limiting damages would have.

According to Nanfelt, some 75 new defects cases were filed that day trying to beat the bill into law.

4/25: Ballot initiative to overturn HB-1161 filed.

of some 69,000 registered voters before it could be placed on the ballot.

Because it is a non-TABOR issue, the initiative would not be before voters until the 2004 elections at the earliest, Nanfelt said.

"This is something we will be tracking closely, and we'll update our members as things develop," he said.

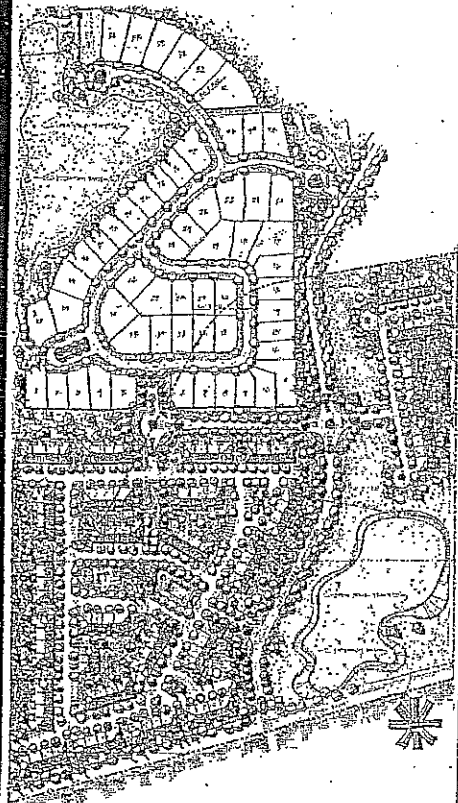
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CAHB Calendar

All meetings are held at the CAHB offices unless otherwise noted.

July

9 Conference Committee (9 a.m.)

10 Editorial Board (9 a.m.)

HomeAid Board of Directors (2 p.m.)

17 Government Affairs Committee (9 a.m.)

August

13 Conference Committee (9 a.m.)

14 Editorial Board (9 a.m.)

HomeAid Board of Directors (2 p.m.)

21 Government Affairs Committee (9 a.m.)

September

10 Conference Committee (9 a.m.)

11 Editorial Board (9 a.m.)

HomeAid Board of Directors (2 p.m.)

17-21 NAHB Fall Board Meetings Boston, Mass.

18 Government Affairs Committee (9 a.m.)

25 Executive Committee (11:30 a.m.)

26 Conference Committee (9 a.m.)

1 DENNIS POLK: Yes. My name is Dennis
2 Polk. And I would generally like to talk about at
3 least the anecdotal experience with 1161 or CDARA.

4 I have been anecdotally keeping track of
5 the success of Notice of Claim and Notice of Claim
6 process. My fingertips have been over several
7 hundred Notices of Claim.

8 I think it is significant that at least
9 in my anecdotal experience, that without resort to
10 litigation, the current act, in my experience, has
11 resulted in somewhere between 93 and 94 percent of
12 those claims being resolved without rushing pall
13 mall to the courthouse.

14 Now why is that important? I understand
15 the laudable nature of what we're attempting to do
16 in this particular instance.

17 I concur in Mr. Levin's remarks. But
18 we're rushing pall mall into a circumstance that
19 will have far more disastrous consequences than I
20 respectfully submit show on the surface of this
21 Bill.

22 I want to try to address some specific
23 matters. I think that there was a serious question
24 about the nature of the express warranty
25 provisions.

1. everybody know about the plight of the subcontractor.

2. That's the reason why we oppose as it stands right now.

3. CHAIR: Are there any questions for Courtney?
4. Senator Sheffield.

5. MR. SCHEFFEL: Thank you, Madam Chair.

6. Courtney, I just comment and I appreciate it that we
7. have spoken. And I just want to lay this out here, and
8. I think maybe some of the other witnesses can address
9. it. As I understand, one of the main concerns of your
10. constituency is that current law allows you the
11. opportunity under such circumstances of defect to
12. actually go ahead and repair and replace. And your
13. chief concern is that that be preserved. And I'll just
14. make the comment and let the experts follow up on it,
15. but it's my understanding that that is not being
16. affected by this legislation. The current law that
17. requires you as a first line to go in and repair and
18. replace a defect will be unaffected by this
19. legislation. And if that is the case, that would go a
20. long way in resolving your hesitancy.

21. CHAIR: Courtney.

22. MR. KYLE: Yes, sir. When we came to you, we
23. came to finish up with an amendment to clarify and make
24. sure we, under the existing construction defects
25. statutes under party Article 20 Title 13, and the whole

1 section goes from 801 to 807. We have an opportunity
2 to go ahead and correct any defective work. And that's
3 why we all got together ten years ago, eight years ago,
4 to do that. That there is certain procedure that's
5 been laid out that would allow us to do this. So we
6 wouldn't have to draw down on our insurance.

7 So if our concern, again, was that this is
8 not clear in this particular piece of legislation. We
9 brought some language for an amendment which we felt
10 would make us feel more comfortable and work with the
11 sponsor of the bill. So that is our concern.

12 CHAIR: Senator Sheffield?

13 MR. SCHEFFEL: And I appreciate that, and I
14 do have that. I'm not sure it's going to be necessary,
15 but I appreciate that, and we'll explore it as we go on
16 hearing some of the other testimony.

17 CHAIR: Any other questions for Courtney?
18 Thank you.

19 MR. KYLE: Thank you..

20 CHAIR: Ron Sandgrund (phonetic).

21 MR. SANDGRUND: I'm in favor of the bill.

22 CHAIR: I'm sorry. Gary Frish (phonetic)?

23 MR. FRISH: Thank you, Madam Chair. There
24 are two of us that are going to testify together.

25 CHAIR: Okay. Can you both come forward, and

Location: Building
B2
Elevations
South Elevation
Obs. Date: 4/4/2010
Investigator: TAF LLS
Image: BE 3_Picture 155.jpg





Index: 560 **Reference:** * **Photolink:** 0560.jpg

Location: 555 RiverGate Lane, Durango

Building: B1 **Unit:** 119 **Room:** Entry door

Direction: n **Elevation:** w

Comment:

Photo Taken on: Sept 22, 2010

By Denver Legal Photography



Gandalf Associates, Inc. limited their inspection, to the location in the home of suspected water intrusion which involved the living room area ceiling. The area of concern within this unit appears to be mainly associated with the kitchen/living room area ceiling. Attention was primarily focused around areas located below the storefront/deck interface of the unit located above Unit B2-251. Water intrusion into this area seems to be a prevalent problem in numerous units at the complex.

Engineering concerns for this project, including structural, drainage, building envelope, ventilation and the control of environmental conditions that have combined to create the water intrusion problem, are being addressed by others. For the purpose of this report, the entrance from the living room to the deck faces south.

OBSERVATIONS & FINDINGS

- The residence is a unit (B2-251) located in the RiverGate Loft Condominium complex in Durango, Colorado.
- The residence is currently occupied. Only limited destructive investigation was completed at the time of our inspection.
- During our inspection on August 11, 2010, water damage was observed at three locations on the kitchen/living room area ceiling, with the heaviest damage at the location in front of the patio door.
- At the time of the inspection, an opening was cut in the ceiling in the vicinity of the water damage to allow for a visual inspection of the ceiling cavity. The ceiling gypsum board removed appeared to include original ceiling as well as a more recent area of ceiling patch material. Fungal growth was observed in the living room area ceiling cavity on the back side of the gypsum board, and on the plywood ceiling deck. The amount of growth that exists is currently unknown as it was determined that additional evaluation would best be conducted under controlled conditions. The growth on the plywood decking was sampled and microscopic analysis indicated the growth to be *Penicillium/Aspergillus* species. The growth observed on the ceiling patch was identified as *Stachybotrys* and *Ulocladium* species, and the growth on the original gypsum board was identified as *Ulocladium* and *Chaetomium* species.
- The fungal growth observed on the original ceiling gypsum and the ceiling patch material suggests that fungal growth existed on the original ceiling prior to the patch material being put into place.

Location: Building
B2
Units
B1-110
Obs. Date: 5/20/2010
Investigator: SWN
Image: STR 3_Picture 122.jpg

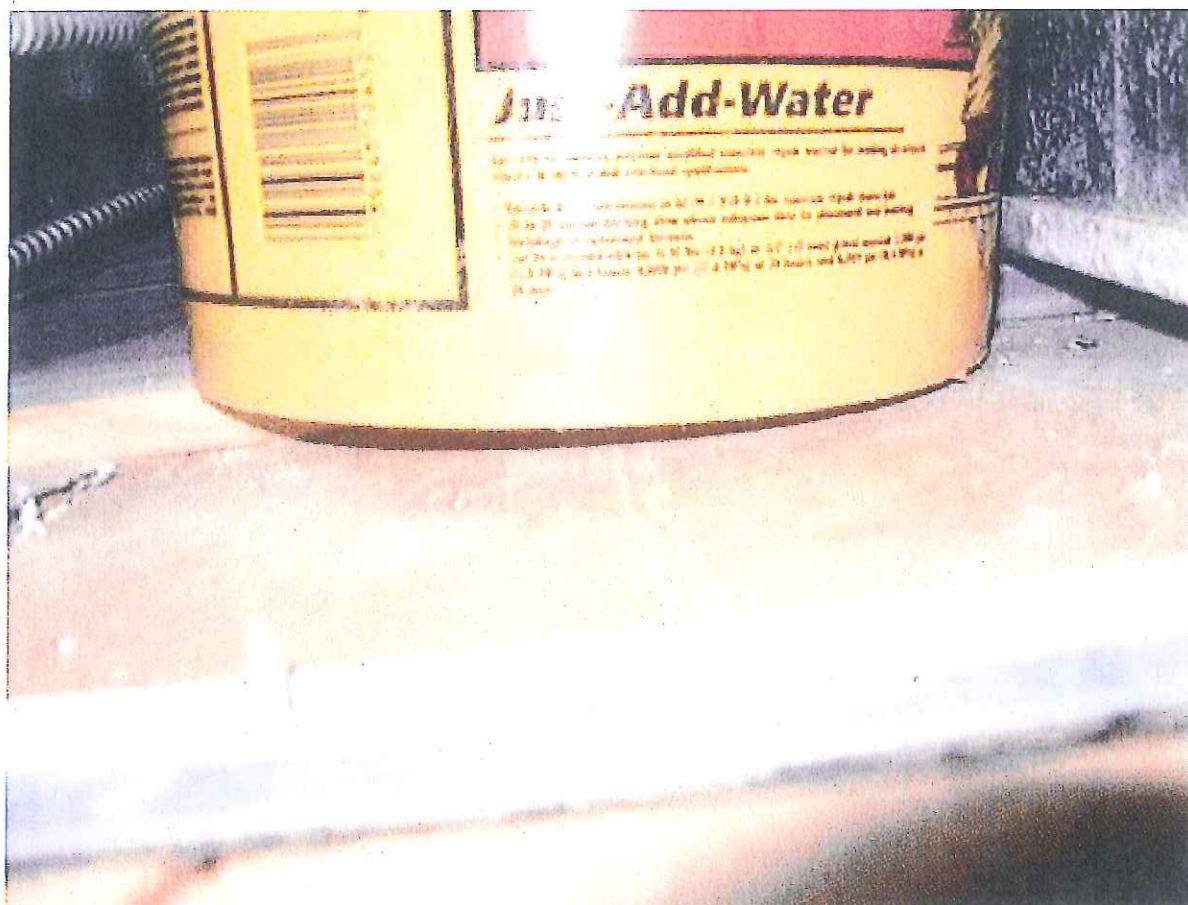


Location: Building
B2
Units
B1-110

Obs. Date: 5/20/2010

Investigator: SWN

Image: STR 3_Picture 123.jpg





To see all the details that are visible on the screen, use the "Print" link next to the map.

